Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of ACS of Anchorage, Inc. Pursuant to	)	
Section 10 of the Communications Act of 1934, as	)	WC Docket No. 05-281
amended, for Forbearance from Sections 251(c)(3)	)	
and 252(d)(1) in the Anchorage LEC Study Area	)	

REPLY COMMENTS OF KETCHIKAN PUBLIC UTILITIES

The City of Ketchikan, Alaska d/b/a Ketchikan Public Utilities ("KPU"), by its undersigned counsel, hereby files these reply comments regarding the petition of ACS of Anchorage, Inc. ("ACS") for forbearance from sections 251(c)(3) and 252(d)(1) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 251(c)(3), 252(d)(1). KPU incorporates herein its initial comments in support of ACS' petition for forbearance, and renews its request that the Commission grant the petition on an expedited basis.

1. The Commission Should Disregard GCI's Opposition

General Communication, Inc. ("GCI"), operator of the cable television system in Anchorage and ACS' main competitor for local exchange service in that market – and the only competitor that employs a UNE-based strategy there[1] -- has filed a lengthy and belabored opposition to ACS' petition. The opposition goes to great efforts to convince the Commission that GCI's continued reliance on access to UNE loops via ACS' network is essential to its competitive business model, and that retail competition in Anchorage would be irreparably damaged if ACS were permitted to terminate its provision of UNE loops at regulated rates.

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1 ACS Petition, at 2-3.

The GCI opposition, however, is based on a fallacious premise and, as a result, should be disregarded. Although GCI would have the Commission believe that its ability to compete in Anchorage will be irreversibly impaired if denied access to UNE loops, GCI has, in actuality, consciously elected to compete with ACS through use of its UNEs at regulated rates, rather than to upgrade its own cable network in Anchorage – which passes 98% of the residences and business establishments -- for the provision of telephony services. In doing so, GCI has transferred from itself to the incumbent service provider the economic risk of infrastructure investment. This fact was convincingly documented in ACS' petition in this proceeding.[2]

In a recent application to the Regulatory Commission of Alaska for expansion of its authority to provide local exchange service in a number of rural markets in the state, including within Ketchikan, GCI represented that it would be "fit, willing and able" to provide facilities-based telephony service by means of its cable facilities and without requiring access to the incumbents' networks.[3] In its opposition before this Commission, however, GCI submits in granular detail arguments as to why it is incapable of providing effective competition without access to the incumbent's network. The obvious inconsistency of these representations must be weighed in determining the credibility of GCI's position in this proceeding.

As a result, the Commission should discount the value of and, ultimately, reject GCI's opposition. A number of other competitive service providers – who do not compete in the Anchorage, or even the Alaska, market – offer theoretical arguments intended to demonstrate

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2 *See* initial Comments of KPU, at 5-7, citing ACS Petition, at 3, 7-9, 12-13. *See also* Comments of Matanuska Telephone Association, at 5-9, 11-13.

3 *Application of GCI Communications Corp. for an Amendment to its Certificate of Public Interest and Necessity to Operate as a Competitive Local Exchange Telecommunications Carrier* , Docket U-05-4, Application filed January 21, 2005.

that ACS has not met the test for forbearance under section 10(a) of the Act.[4] Under the approach adopted by the Commission in its recent *Omaha Forbearance Order*, however, the determination of whether forbearance from enforcing section 251(c)(3) of the Act is justified is an intensely factual one based on the specific characteristics of the local market in question.[5] Like GCI's opposition, which fails to portray properly the competitive dynamics of the robust retail market in Anchorage documented in ACS' petition, the comments of these other parties should similarly be viewed as having only hypothetical relevance to the Commission's consideration in this proceeding.

Of far greater relevance are the comments filed in support of ACS' petition by Matanuska Telephone Association ("MTA"), a cooperative rural telephone company that is actively engaged in facilities-based competition with GCI. As its comments make clear, MTA has witnessed first hand GCI's use of UNE loops as a tool for regulatory arbitrage to the unfair disadvantage of the incumbent carrier.[6]

2. The Commission's Analysis in the *Omaha Forbearance Order* Supports Approval of Forbearance in the Anchorage Market

The standards applied by the Commission to grant Qwest forbearance from its obligation to support competition by means of UNEs at the local loop level in Omaha are equally applicable to the robust retail market in the Anchorage market that ACS has documented in its petition. To begin with, ACS faces a competitor of formidable size and market prowess.[7] GCI is the largest integrated provider of telecommunications services in Alaska, holding leading market shares in

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4 47 U.S.C. § 160(a). *See* Comments of Covad Communications Group, Inc.; Comments of NuVox Communications, Inc., at al.; Opposition of Time Warner Telecom, et al..

5 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, FCC 05-170, released December 2, 2005 ("*Omaha Forbearance Order*"), ¶ 63.

6 MTA Comments, at 5-9.

7 *Omaha Forbearance Order*, ¶ 38.

the interexchange and Internet access sectors. Its cable television business is by far the largest of any provider in the state, and it controls some 80% of the connection capacity between Alaska and the Lower 48 states. Its revenues far outstrip those of ACS, and it commands broader name recognition in the state than does the incumbent operator in Anchorage.

The Commission accepts competition among intermodal facilities as a legitimate basis for determining the state of competition at the local level.[8] The evidence in the present record demonstrates that GCI operates extensive facilities of its own in Anchorage which, combined with GCI's established presence in the state and strong brand, presents a "substantial competitive threat" to ACS is is demonstrated by its capture of 49% of the mass market since the launch of its local exchange service in 1997.[9] According to GCI's opposition, its competitive network in Anchorage includes its own switch, collocations at each of ACS' central office switches in the market, and an independent metropolitan area fiber transport network, combined with leasing unbundled loops from ACS.[10]

Regardless of GCI's election for reasons of economic self-interest not to compete for last-mile access by means of this network, the record demonstrates the existence of a competitor that is "willing and able within a commercially reasonable time" to provide service to a significant majority of end users in Anchorage by means of its own facilities.[11] In light of the continuing disincentive to true facilities-based competition that UNE loops present, the costs of their availability in Anchorage must be seen as outweighing their benefits.[12] Finally,

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8 *Id.*, ¶ 65.

9 *Id.*, ¶¶ 59, 66.

10 GCI Opposition, at 2.

11 *Omaha Forbearance Order*, ¶ 69. *See also* Comments of United States Telecom Association, at 2.

12 *Omaha Forbearance Order*, ¶ 76.

forbearance will further the interests of regulatory parity in the Anchorage market by placing ACS on a more even footing in relation to its larger competitor.[13]

GCI's attempts in its opposition to distinguish the relevance of the Commission's *Omaha Forbearance Order* are not convincing. To begin with, it admits that the Commission's decision to require Qwest to continue to make loops available pursuant to section 271 of the Act is not relevant to ACS' situation.[14] More insidiously, GCI tries to argue that its election to rely on UNE loops to compete with ACS is itself sufficient reason for a determination that access to such unbundled elements is essential to competition in the Anchorage market.[15] The obvious circularity of this reasoning demonstrates its lack of any public value. The Commission has frequently acknowledged, including in the *Omaha Forbearance* Order,[16] the "integral" role played by section 10 of the Act[17] in facilitating the Act's pro-competitive and deregulatory objectives. The Commission would effectively eviscerate its forbearance authority if it were to determine that this authority should not be used in circumstances where its application can have actual beneficial effect on the competitive market.

3. GCI's Use of UNEs Distorts the Intention of Section 251(c)(3)

As recognized by the Commission in the *Omaha Forbearance Order*,[18] Congress' original intention in making access to UNEs available under the Act was to give "new market entrants, which in 1996 lacked sufficient economies of scale and scope to compete effectively in the local exchange and exchange access markets, the right to compete with the incumbent LEC

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13 *Id.*, ¶¶ 76, 78.

14 GCI Opposition, at 4-5.

15 *Id.*, at 3-4. *See Omaha Forbearance Order*, note 185.

16 *Omaha Forbearance Order*, ¶ 13. *See also* Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

17 47 U.S.C. § 160(a).

18 *Omaha Forbearance Order*, ¶ 76.

in these markets." The "high degree of regulatory intervention" which section 251(c)(3) represents was viewed, however, only as a tool that may "*initially* be required in order to generate competition" (emphasis added).

For GCI in Anchorage, however, UNE loops have not been used as a means to gain initial entry to the market, but instead as a tool to develop dominance in that market at the expense of the incumbent carrier through protracted use over a period of many years. Even now, nine years after it launched its competitive local exchange service, GCI is arguing that it is entitled to determine the timing at which, for its own convenience and economic benefit, it will migrate off of UNEs and onto its own network, which has existed in the Anchorage market since the passage of the 1996 Act. GCI is not a start-up company, but a competitor with resources far in excess of those of the incumbent carrier in Anchorage. Section 251(c)(3) of the Act was simply not intended for the purposes to which GCI has applied it, and the Commission should not permit GCI to continue to abuse the provision at the expense of deploying true facilities-based competition.

4. Forbearance Should Not Be Solely Dependent on a Market Share Analysis

GCI's success in capturing virtually half of the Anchorage retail local exchange market from the incumbent carrier stands as impressive evidence of successful competition justifying the withdrawal of access to UNE loops on the incumbent's network. KPU concurs with the view of other commenting parties in this proceeding, however, that the availability of forbearance should not, as a general principle, be tied to any mathematical formula. Instead, it should be based on the determination of the existence of viable competitive substitutes that eliminate the market power of the incumbent and, thereby, justify the removal of artificial regulatory mechanisms.[19]

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19 *See* Comments of Verizon, at 2-5; Comments of USTA, at 2-3.

Thus, KPU agrees that the Commission's forbearance authority can be exercised in a market in which the competitor has not yet gained any specific level of market share, but where all the elements of effective competition, including relative lack of barriers to entry, have been found to exist.

5. ACS' Petition Should be Granted Expeditiously

Given GCI's elective use of UNE loops as a tool to gain competitive advantage, rather than for market entry, KPU concurs with USTA's recommendation that relief from section 251(c)(3) obligations is required by ACS expeditiously. As USTA has noted in its comments, ACS is required to make pieces of its network available at cost-based rates while its competitors, most importantly GCI, are not subject to the same, or even similar, regulatory constraints.[20] The Regulatory Commission of Alaska has found GCI's use of UNE loops in markets like Anchorage to constitute regulatory arbitrage that works to the detriment of the legacy network provider.[21] The longer GCI can make use of unbundled local loops at regulated rates, the longer it can defer assuming the risk of facility investment, and the more extended will be the competitive disadvantage to the incumbent.

The result is an uneven playing field. The Commission has the opportunity to help rectify this circumstance by granting forbearance. ACS has demonstrated its entitlement to forbearance and KPU urges that the Commission do so promptly, and without waiting until the end of the permitted statutory period.

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20 USTA Comments, at 4-6.

21 *See Petition for Suspension and Modification of Certain Section 251(c) Obligations Pursuant to Section 251(f)(2) of the Telecommunications Act of 1996 filed by Matanuska Telephone Association, Inc.*, Order U-05-46(8), issued December 20, 2005, at 12-14 (copy attached as Exhibit A to initial MTA Comments).

Conclusion

GCI's reliance on access to ACS' UNE loops has been voluntary and economically motivated. It cannot argue impairment from denial to such access in the Anchorage market. For the reasons set forth above, as well as in ACS' petition and in KPU's initial comments, KPU believes that the standards under section 10(a) of the Act for forbearance from enforcement of ACS' section 251(c)(3) obligations in the Anchorage market have been met, and urges that the Commission grant the petition for forbearance expeditiously.

Respectfully submitted

KETCHIKAN PUBLIC UTILITIES

By: _____
Heather H. Grahame
Stefan M. Lopatkiewicz
Dorsey & Whitney, LLP
1001 Pennsylvania Ave., N.W.
Suite 400 North
Washington, D.C. 20004
(202)442-3553
Its Counsel

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